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RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

RICHARD NOLL, individually and on  
behalf of himself and all others similarly  
situated.

Plaintiffs.

v.

E-BAY INC., and DOES 1 through 10.  
inclusive

Defendants.

Case No. 11-cv-04585 EJD

**OBJECTION TO APPROVAL OF  
SETTLEMENT AND DEMAND TO  
OPT-OUT IF PROPOSED  
SETTLEMENT IS APPROVED  
re: DKT 130**

**Honorable Edward J. Davila**

Date 6/11/15 Time 9:00am Rm 4 Fl 5

**-- ORAL ARGUMENT NOT REQUESTED --**

The above named class member appear to OBJECT to the approval of a settlement as filed for as Dkt 130 on the grounds the settlement is that eBay settles from a position of strength – not arms length - offering \$15,000 to each of the plaintiffs to shut up and take the settlement to screw over the class as class representatives and this kind of thing is NOW not favored in the 9th Circuit - and is arguably no longer lawful. *Radcliffe v. Experian Information Solutions, Inc.*, 715 F.3d 1157 (9th Cir.4/23/13) <http://cdn.ca9.uscourts.gov/datastore/opinions/2013/05/02/11-56376.pdf> and such incentive awards coupled with the breath of this class release over-steps the narrow realm of this suit – see also *Radcliffe* analyzed at

Objection to approval of settlement and to opt out if so  
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1 [http://www.lexology.com/library/detail.aspx?g=3ed670ef-954f-4b5e-ab93-](http://www.lexology.com/library/detail.aspx?g=3ed670ef-954f-4b5e-ab93-be023889ec06)

2 [be023889ec06](http://www.lexology.com/library/detail.aspx?g=3ed670ef-954f-4b5e-ab93-be023889ec06) If Mr. Noll receives \$15,000, so too should each class member also

### 4 **PROCEDURAL POSTURE**

5  
6 There is nothing “fair” about this settlement – it creates a class out of thin air –  
7 where the narrow circumstances of the Richard Noll scenario have been expanded  
8 by defendants to cover anyone as an eBay member who ever posted a “good til  
9 cancelled” listing – and never complained about it; yet aside from giving a  
10 miniscule amount of a payment to class members – eBay seeks a release against  
11 the class members they have created that covers any and all litigation based on any  
12 eBay policy or scenario that could be brought in the future or could have been  
13 raised as an issue in this suit. That could be anything as to how eBay operates.

14  
15 If class members as defined in the settlement DO NOT OPT-OUT - then they are  
16 bound by the terms of the settlement in this case where the meat lies is in the  
17 RELEASE from section 4.2 of Dkt 130-1 page 16

18  
19 “4.2 Class Members’ Release. Upon entry of the Final Order and  
20 Judgment, Named Plaintiffs and all Class Members who do not  
21 validly and timely request to be excluded from the proposed  
22 Settlement, and each of their respective successors, assigns, legatees,  
23 heirs, and personal representatives release and forever discharge eBay  
24 Inc., and each of its respective direct or indirect parents, wholly or  
25 majority owned subsidiaries, affiliated and related entities,  
26 predecessors, successors and assigns, partners, privities, and any of  
27 their present and former directors, officers, employees, shareholders,  
28 agents, representatives, attorneys, accountants, insurers, and all  
persons acting by, through, under or in concert with them, or any of  
them, from all manner of action, causes of action, claims, demands,  
rights, suits, obligations, debts, contracts, agreements, promises,

liabilities, damages, charges, penalties, losses, costs, expenses, and attorneys' fees, of any nature whatsoever, known or unknown, in law or equity, fixed or contingent, which they have or may have arising out of or relating in any way to any of the legal, factual, or other allegations made in the Action, **or any legal theories that could have been raised based on the allegations of the Action** (the "Released Claims")."

There is a problem found at Fed. R. Civ. P. 23(c)(2)(B)(iv) – "(iv) that a class member may enter an appearance through an attorney if the member so desires;" in that it appears to say no one may appear pro se - or before a settlement is reached unless they attempt to join the action – and arguably they should be allowed to do so – but seldom has this ever occurred and when it does the courts rebuke the attempt to join as one to intervene and come into the suit BEFORE a settlement is reached . Then class members as OBJECTORS are left with no other recourse but to object AFTER preliminary approval and the courts often just rubber stamps an approval which works in the favor of those selling the settlement to the court.

In such a case, the class member as an Objector may not even appear without counsel but for the effort to Object under Rule 23(e)(5) for what is normally a "fairness hearing", or "opt-out" under Rule 23(c)(2)(B)(v). There is nothing even fair about that process in and of itself. Rule 23(e)(5) however does not speak to a timeline as to when a class member may object, thus it may be upon any notice or discovery that settlement efforts are about to commence without them and thus to be included in those talks to raise the very issues, i.e.; the release of this settlement casts need to raise in the litigation as a term of the release. See SHIMKUS v. The GERSTEN COMPANIES, 816 F.2d 1318, 7 Fed.R.Serv.3d 767, No. 85-2594. Ninth Circuit, Argued and Submitted Nov. 10, 1986., Decided May 6, 1987. Rule 19(d) to 23 creates however a catch 22 scenario instead requiring an attorney.

1 Here we have a settlement that violates the 9<sup>th</sup> Circuit principles in *Radcliffe* and  
 2 has a defined a class beyond the scope of the suit to favor the defendants need to  
 3 create a judgment over a concocted class that is not a class in its true rights.

4  
 5 There are three other known suits pending in this district one of which is two  
 6 related cases and now with its settlement efforts stalled due to attorney  
 7 shenanigans and unauthorized practice of law issues from out of state filing  
 8 counsel - and the same tactics of the same defendants to extend the settlement to  
 9 create and cover a judgment AGAINST the class members. See *Zepeda v PayPal*  
 10 10-cv-2500 SBA and the order of Dkt 205 which states as much in denying the  
 11 approval of the settlement. (related to *Fernando v PayPal* 10-cv-1688 SBA)

12  
 13 Also a fairly serious class action matter that is tangentially related to the *Noll* case  
 14 in existence so eBay is in a rush to make THIS settlement in *Noll v eBay* happen  
 15 first and fast to stop class members from being able to reap any potentially larger  
 16 benefits from the *Campbell v eBay* lawsuit - now heading to settlement also. See  
 17 *Campbell v eBay* USDC CAND 13-cv-2632 HSG

18  
 19 This court cannot approve this settlement as drafted so broadly – and as the release  
 20 alone harms the class by eclipsing the members rights for nothing they did.

21  
 22 The district judge has a fiduciary duty to safeguard the interests of the absent and  
 23 putative class members. *See, e.g., Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 319 (3d  
 24 Cir. 2011) (stating that “‘trial judges bear the important responsibility of protecting  
 25 absent class members,’ and must be ‘assured] that the settlement represents  
 26 adequate compensation for the release of the class claims’”); *Maywalt v. Parker &*  
 27 *Parsley Petroleum Co.*, 67 F.3d 1072, 1078 (2d Cir. 1995) (noting that “the  
 28 district court has a fiduciary responsibility to ensure that the settlement is fair and

not a product of collusion, and that the class members' interests were represented adequately") (internal quotation marks omitted). That duty is especially important when the interests of the class and its counsel negotiating on its behalf are not aligned. *See Reynolds v. Benefit Nat'l Bank*, 288 F.3d 277, 279–80 (7th Cir. 2002) (stating that the problem that class counsel "may, in derogation of their professional and fiduciary obligations, place their pecuniary self-interest ahead of that of the class . . . requires district judges to exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions").

There is also the serious question of whether an out of state law firm can be Class Counsel in a suit involving violations of California law – even appearing pro hac vice. *See Winterrowd v. American General Annuity Ins. Co.<sup>1</sup>*, 556 F.3d 815, 2009 WL 367696 (9th Cir. 2009) None of the Figari & Davenport attorneys are California licensed and thus a serious question exists as to whether they can be Class Counsel as a firm in California litigation. Clearly they do not know California law as the numerous complaints missing the mark attest to.

The court denied dismissal based on what amounts to California Tort law – and this matter is actually a mass tort – not a class action. Each party who has or could

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<sup>1</sup> The Winterrowd court based its holding on the fact that Wheatley did not "appear" before the district court. The court undertook to differentiate between merely supporting litigation and "appearing." Fees may be recovered, the court noted, for the work of many who perform litigation support such as paralegals and summer associates. The court reasoned that Wheatley's work was similar to such litigation support. On the other hand, factors that would indicate an "appearance" would be physically entering the court, signing pleadings, and having extensive contact with the client without in-state counsel present. In reaching its conclusion, the court relied on *Dietrich Corp. v. King Resources, Co.*, 596 F.2d 422 (10th Cir. 1979), which held that an out-of-state attorney's work is not the unauthorized practice of law so long as it is filtered through a licensed in-state attorney.



1 have a claim based on eBay policies as outlined in this suit by Richard Noll, - as  
 2 the release seems to attempt to cover in blanket fashion, has damages in Tort under  
 3 California law by User Agreement construction – not typicality and commonality .  
 4

5 There is precedent that the court can put out a call for other interested counsel to  
 6 apply to appear to be class counsel. See e.g Guererro v Wells Fargo Bank and the  
 7 orders of Dkt 157, 158, 164, 165, 166 and 167 of same putting out a call for class  
 8 counsel and appointing same from a list of applicants, to explore the objection to  
 9 meet the requirements of the duty of the court to protect the class and under Rule  
 10 23(c)(2)(B)(iv) – “(iv) that a class member may enter an appearance through an  
 11 attorney if the member so desires;”. Here to enter an objection raises an issue of  
 12 how the court’s duty to protect the class might extend to exploring a class member  
 13 objection and its issues as this one raises these issues of or to appoint other Class  
 14 Counsel actually qualified and licensed to do business in California courts.  
 15

16 For Figari & Davenport LLP to be lawful Class Counsel in a California court they  
 17 need to have California Licensed counsel on staff appearing or an Association of  
 18 Counsel agreement on file to a California attorney – not just a pro hac vice order.  
 19

20 Myself and five other putative class members were in front of judge Davila to join  
 21 and intervene in Dunkel v eBay case 12-cv-1452 EJD which rather than grant the  
 22 intervention and allow the filing of a new complaint based on a similar theory of  
 23 law as in the Noll matter – the case was dismissed because the original filing  
 24 attorney - Marina Tributsky was not a California licensed Attorney, nor pro hac  
 25 vice complaint under the rules, and - did such a grand job of screwing it up and  
 26 other filings mixing the case to Zepeda v PayPal and Fernando v PayPal, supra.  
 27

28 This is a “stonewall scenario” in contract that forced Richard Noll to court, not a

breach of contract. *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.* (1984) 36 Cal.3d 752 , 206 Cal.Rptr. 354; 686 P.2d 1158 (SCOCAL, *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.* , 36 Cal.3d 752 available at: (<http://scocal.stanford.edu/opinion/seamans-direct-buying-service-inc-v-standard-oil-co-28331>) (last visited Saturday March 7, 2015).

This Noll suit was thus about Interference with Prospective Economic Advantage – for eBay cancelling his listing without his consent; though the order denying dismissal was only loosely written from that perspective, and so eBay could write their own settlement because the complaint was weak under the law.

The issue with Noll was that eBay canceled a listing after a sale was made but the buyer tried to pay with a fraudulent payment method with the fake money order cash back scheme - and in legal terms it was an interference with Prospective Economic Advantage of the listing member to not then to be able to sell the item to someone one else while the fraudulent payment attempt was being tried which the eBay member listing the item had no intention of accepting - and did not accept.

Even though the eBay member - Richard Noll - did not select the "Good til Canceled" option - which would NOT have canceled the listing until payment was actually made - available if payment was made "via PayPal" his argument was the terms were not clear and eBay's effective "interference" harmed him and deprived him of the ability to sell to other parties following the listing and interested in the item also. It is a stretch of the complaint as drafted to cover this but is the law.

The Campbell v eBay case has a similar Interference issue - but much stronger - where eBay adjudicates disputes between the buyer and seller and Interferes with what are often fraudulent attempts to gain a refund of money after receiving the

1 item or returns another item or damages the item prior to returning it - even if there  
 2 is a no refunds policy of the listing member - which eBay always grants as a  
 3 refund. eBay seeks to pre-empt that class and gain a judgment over them in this  
 4 class before any settlement based on true interference can be had in Campbell.

5  
 6 The REAL issue is eBay is the seller as a virtual consignment vendor; and the  
 7 listing member is a drop shipper only because eBay now by the terms of its User  
 8 Agreement, controls the transaction. eBay does not make this "clear" to eBay  
 9 members who list and leads them to believe they are the seller - when in fact they  
 10 basically have no enforceable or honored contract terms at all with the buyer.

11  
 12 This is what has been the issue since the Comb v PayPal matter and came to be an  
 13 issue in Zepeda v PayPal – as it is also here but disguised. There is no need to  
 14 settle with a Release so wide but to destroy the Comb settlement which eBay and  
 15 PayPal are having no success at this writing doing in Zepeda but to create a  
 16 Judgment against the class to destroy the Comb settlement<sup>2</sup>. The Release of this  
 17 settlement effectively does that also. Judge Fogel made that quite clear in his  
 18 order in Zepeda v. PayPal, Inc., 777 F. Supp. 2d 1215 - Dist. Court, ND California  
 19 2011 as to why the eBay and PayPal User Agreements are the root cause of the  
 20 issues, and still today it continues as eBay policies dodge compliance to California  
 21 law but have run to Utah now instead in violation of the that settlement because  
 22 they represent a violation of a court order which is the Comb settlement. This is  
 23 why eBay and PayPal have so much invested in gaining the outcome they seek to  
 24 destroy the Comb settlement by eclipsing any class member at any time from being  
 25 able to use the Comb settlement ever again after this one.

26  
 27  
 28 <sup>2</sup> Found at <http://www.paypalsucks.com/files/PayPalSettlementAgreement.pdf>

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Section “2d. Venue” and “III Disposition” in Judge Fogel’s ruling is a serious gravamen to eBay and PayPal because they have never corrected the User Agreements to past the tests of fairness – and instead ran to the jurisdiction of Utah for a new choice of law forum for the User Agreement to escape laws of California and Judge Fogel’s ruling having the effect of law on them. See *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165 (N.D. Cal. 2002) District Court, N.D. California. The issues of the that settlement are the very “policies” Richard Noll ran into which brought him here, because eBay continues to refuse to comply with what California law requires that would have been clear in the “good til’ cancelled” listing. This places the burden BACK on the court in a piece meal fashion then. See *Managing Class Action Litigation: A Pocket Guide for Judges*, Barbara J. Rothstein & Thomas E. Willging, Federal Judicial Center 2005, Section III, “Hot Button Indicators” pg 13 number 3.<sup>3</sup> Certainly, such a conspiracy to disserve the class, is alone a basis for denying class certification and rejecting a settlement,<sup>4</sup> but as a general matter, rather the structural problem of lack of leverage is the real problem.

There is no reason to certify a class in the case, because it is a “mass action”<sup>5</sup> – not a class action. There is no commonality – these are all tort issues of interference

<sup>3</sup> See [http://www.fjc.gov/public/pdf.nsf/lookup/classgde.pdf/\\$file/classgde.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/classgde.pdf/$file/classgde.pdf)

<sup>4</sup> See, e.g., *Sylvester v. CIGNA Corp.*, 369 F. Supp. 2d 34, 45 (D. Me. 2005) (“[K]ey provisions of the Amended Settlement Agreement, which were finalized by the parties after the mediation session, combine to form an agreement that appears collusive on its face and in practice. Specifically, the Court remains troubled by the combination of the reverter clause and the clear sailing provision. In concert, the Court believes that these two provisions give rise to inferences that there was a lack of arm’s length negotiations and a lack of zealous advocacy for the Class by Plaintiffs’ counsel.”).

<sup>5</sup> See e.g. <http://www.starrausten.com/resources/what-is-the-difference-between-a-class-action-and-a-mass-tort-mass-action/>

1 with prospective economic advantage and contractual relationships – not common  
 2 breach of contract and the like for the reasons Judge Fogel so articulately ruled.

3  
 4 In *Guerrero, et al v. Wells Fargo Bank, N.A.*, Case 3:12-cv-04026-WHA (USDC  
 5 CAND) Document 157 Filed 06/21/13 at Page 22 Judge Alsup wrote :

6  
 7 Absent class members' interests "are truly in the hands of class counsel."  
 8 1 Newberg on Class Actions § 3:52 (5th ed.). Rule 23(g) places the  
 9 responsibility of ensuring fair and adequate counsel on the Court, not  
 10 merely on the class representative. Under Rule 23(g), the Court has  
 11 broad authority in executing its "basic responsibility . . . to appoint class  
 12 counsel" that will "fairly and adequately represent the interests of the  
 13 class." Fed R. Civ. P. 23 Advisory Committee's Note (2003). The rule  
 14 includes a list of mandatory factors to consider and provides  
 15 that the Court "may consider any other matter pertinent" to counsel's  
 16 adequate representation of the class. The rule contemplates that there can  
 17 be circumstances in which more than one applicant counsel can apply to  
 18 represent the class. Rule 23(g)(2).

19 His conclusion was proposed class counsel was inadequate for several reasons and  
 20 his order sent out an invitation for more qualified counsel to be named to the case  
 21 in that same order of June 21, 2013. It is no different here, for these reasons the  
 22 settlement must be denied and new class counsel appointed. Rule 23(e)(5) does  
 23 not say you must opt-out OR object, - both can be done as here in the alternative.

24  
 25 I declare by the laws of the State of California under penalty  
 26 of perjury the above is true and correct signed at  
 27 Tustin, California this 9<sup>th</sup> day of March , 2015

28  
  
 REGINALD R. BURGESS

Class Notice ID 08103529

Objection to approval of settlement and to opt out if so  
 Case 11-cv-04584 EJD

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4 Class Notice ID 08103529 in Noll v eBay 11-cv-4585 EJD

5 Attorney for: Reginald Burgess  
6  
7  
8

9 **CERTIFICATE OF SERVICE**

10 As a pro se appearing class member, as I do not have an ECF privilege for direct  
11 filing, I have this date sent to the Clerk of Court for filing this document in the  
12 Northern District Electronic Case Filing system via email as an ECF compliant  
13 PDF copy to the Judges deputy clerk of this case and via US Mail an Original and  
14 the required number of courtesy copies per the Judges standing order with a good  
15 receipt and copied via email to all the listed parties appearing counsel as set forth  
16 in the current PACER Docket Report as shown in the Deputy clerk's email; so that  
17 thus all parties who have consented to electronic service will receive notice of this  
18 filing by operation of what the ECF system uses as electronic notice. Any parties  
19 who have not consented to electronic service will receive a paper copy of this  
20 electronically filed document through the United States Postal Service.  
21

22  
23  
24  
25   
REGINALD R. BURGESS

26 I declare by the laws of the State of California under penalty  
of perjury the above is true and correct signed at  
Tustin, California this 9<sup>th</sup> day of March , 2015  
27  
28

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